IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JUSTIN LEVI PARHAM, Appellant.	No. 37411-1-II UNPUBLISHED OPINION

Hunt, J. — Justin Levi Parham appeals his jury trial convictions for residential burglary, first degree theft, and two counts of bail jumping. He argues the trial court erred when it (1) admitted evidence of his prior convictions under ER 609(a)(2) for impeachment purposes without limiting that evidence to the bail jumping charge, about which he testified; (2) refused to instruct the jury that Parham's failure to testify about the burglary and theft charges could not be considered as evidence of his guilt; and (3) denied Parham's motions to sever the bail jumping charges from the burglary and theft charges. We affirm.

FACTS

I. Burglary and Theft

On the evening of January 23, 2007, Jennifer Peterson and her son arrived home to find that someone had entered the home they shared with Peterson's fiancé, James Dean; ransacked it; and stolen various items,[1] including a variety of electronics and a new plasma flat screen television. Someone had removed the window screen from a ground floor window that faced the

[1] Dean's insurance company paid him approximately $5000 for the missing items.

family's fenced backyard, and the window was open. The sliding glass door in the kitchen was also open. Peterson called 911 and Dean.

A forensic investigator for the Pierce County Sheriff's Office processed the scene and found a partial palm print and a fingerprint on the back window. Forensic investigators matched the prints to Justin Parham. Peterson, her son, and Dean did not know Parham, and they never gave Parham permission to be in the home or the yard.

Three days later, Sheriff's Detective Elizabeth Lindt contacted Parham, who agreed to meet with her at the precinct office. After Lindt advised Parham of his *Miranda*[2] rights, Parham (1) asserted that he had been home the day of the burglary, (2) denied knowing anyone who lived near the Peterson/Dean home, and (3) denied having been to the home. But Parham could not explain how his prints on the window. When Lindt asked about his residence, Parham told her "there were things there that he didn't want [her] to find."[3]

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] Before trial, Parham moved to suppress his statements to Lindt, including his refusal to give Lindt permission to search his residence and his statement that he did not want her to search his residence because there were things in his residence that he did not want her to find. The trial court ruled that the State could not present evidence that Parham refused Lindt's request to search but that it could present Parham's additional statement that there were things in his residence that he did not want Lindt to find. Parham does not challenge this ruling on appeal.

II. Procedure

A. Bail Jumping

After the State charged Parham with residential burglary, the trial court released him on his own recognizance. Parham then failed to appear at his May 2 and July 25 omnibus hearings. The State amended the charging information to add two counts of bail jumping and a first degree theft charge. Parham pleaded not guilty.

B. Severance Motions

Both before trial and after the State rested its case in chief, defense counsel moved to sever the burglary and theft charges from the bail jumping charges. Defense counsel argued that (1) the State could present evidence of Parham's prior convictions for second degree possession of stolen property and possession of a fictitious or altered driver's license as impeachment evidence under ER 609(a)(2) if Parham testified about the May 2 bail jumping charge, but (2) the prior convictions would not be admissible in the trial of Parham's burglary and theft charges because Parham was not going to testify about those charges.[4] Defense counsel also emphasized that the evidence on the bail jumping charges was stronger than the evidence of the burglary and theft.[5]

The State argued that severance was not required just because evidence of Parham's prior convictions might come in if he testified to some but not all of the charges. The trial court agreed

[4] Defense counsel also argued that the two bail jump charges were prejudicial to the burglary and theft charges, but he recognized that courts do not usually sever bail jump counts from the related underlying charges.

[5] Defense counsel also moved to limit the scope of the State's cross-examination to the scope of Parham's testimony. The trial court granted this motion.

with the State and denied Parham's motions to sever.

C. Parham's Defense to the May 2 Bail Jumping Charge

After the trial court denied Parham's second motion to sever, he testified about only the May 2 bail jumping charge. He did not deny that he failed to appear for the May 2 omnibus hearing. Instead, he presented an "uncontrollable circumstances" defense.

Parham testified that (1) his car's fan belt broke as he was driving to court that day at about 8:45 am; (2) when he could not get his car started again, he first called his brother in Spanaway from a payphone; (3) although his brother apparently agreed to come help him, he (Parham) left his car and walked to the courthouse; (4) he did not intend to miss court that day; but (5) when he arrived shortly after 11:00 am, someone told him that it was too late and that he needed to "file[] for a quash hearing," which he did immediately. Parham also testified that his car had not been working well for some time and that there was gas station nearby when his fan belt broke.[6]

Parham also testified about his prior convictions. He was the only defense witness. He presented no evidence related to the burglary charge, the theft charge, or the second bail jumping charge.

[6] On cross-examination, Parham became confused about what day his car had broken down and seemed to assert that it could have broken down on July 25 rather than on May 2.

D. Jury Instructions

1. Defendant's failure to testify

Initially, both the State and Parham proposed the following instruction:

> The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

Clerk's Papers (CP) at 42 (State's proposed), CP at 67 (Defense proposed).

After the parties rested, the State withdrew this proposed instruction, arguing that this instruction would confuse the jury because Parham had testified, and the instruction did not "talk about testifying in a limited capacity or regarding only certain counts." Defense counsel refused to withdraw Parham's proposed instruction, arguing that the trial court should still give this instruction because Parham's testimony did not relate to every charge. The trial court agreed with the State and refused to give this proposed instruction.

After the trial court presented the parties with its final instructions, defense counsel again objected omission of this proposed instruction. Defense counsel did not offer a different instruction attempting to limit the proposed instruction to the burglary and theft charges.

2. Prior conviction limiting instruction

Both Parham and the State proposed the following instruction:

> Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

CP at 41 (State's proposed), CP at 66 (Defense proposed). The trial court gave this instruction to the jury. Neither party requested an instruction that limited the use of the prior convictions to

the May 2 bail jumping charge.

The jury found Parham guilty of all four counts. Parham appeals.

ANALYSIS

I. ER 609(a)(2) Impeachment Evidence

Parham first argues that the trial court erred when it allowed the State to present his prior offenses as impeachment evidence without limiting the admission of this evidence to the sole bail jumping charge about which he testified. He also argues that this error was prejudicial, especially in light of the similarity between the impeachment offenses and the burglary and theft charges. This argument fails.

A. Standard of Review

ER 609(a) provides:

> For the purpose of attacking the credibility of a witness in a criminal . . . case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment.

We review the trial court's admission of prior convictions under ER 609 for abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996) (citing *State v. King*, 75 Wn. App. 899, 910 n.5, 878 P.2d 466 (1994), *review denied*, 125 Wn.2d 1021 (1995)). "[A]n erroneous ER 609 ruling is not reversible error unless [we] determine[] that 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Rivers*, 129 Wn.2d at 706 (quoting *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991)).

B. No Error

At the outset, we note that that the trial court's limiting instruction specifically limited the use of the prior offenses to determining the weight and credibility of Parham's *testimony*. We presume that the jury followed this instruction. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). Parham's *testimony* was limited to the May 2 bail jumping charge. Thus, following the instruction the trial court did give, the jury could not have considered the impeachment evidence in relation to the burglary and theft charges even though the limiting instruction did not expressly prohibit it from doing so.

C. No Abuse of Discretion

Parham does not challenge the trial court's conclusion that his prior convictions for second degree possession of stolen property and possession of a fictitious or altered driver's license were crimes of dishonesty that were admissible under ER 609(a)(2). Instead, his argument focuses on the trial court's admitting the ER 609(a)(2) evidence without instructing the jury that it could consider the prior convictions in relation to only his bail jumping charges.[7] We hold that any potential error in not further limiting the ER 609(a)(2) evidence was harmless.

First, the State had strong physical evidence against Parham on the burglary and theft charges: (1) his finger and palm prints on the window that the burglar used to enter the Peterson/Dean home; (2) there was no evidence that Parham had ever been to the Peterson/Dean home before the date of the burglary and, therefore, no other explanation for the presence of his

[7] We note that on appeal, Parham does not argue that (1) these prior offenses were not crimes of dishonesty that were generally admissible for the impeachment purposes under ER 609(a)(2), (2) the ER 609(a)(2) evidence was not admissible as to the second bail jumping charge, or (3) the admission of this evidence was prejudicial to that charge.

prints on the window; and (3) there was strong circumstantial evidence that the person who had opened the window did so in order to commit theft and that the person who had entered the home had stolen several items from inside.

Second, during his interview with Lindt, Parham denied ever having been to the Peterson/Dean home, despite the finger and palm print evidence connecting him to the home. In light of the physical evidence, this denial strongly suggested that Parham was not credible and was attempting to hide his guilt, regardless of the trial court's admission in to evidence of his prior convictions. And third, only one of the prior offenses was particularly prejudicial given the nature of the current offenses: The prior possession of a fictitious or altered driver's license conviction may have diminished Parham's credibility, but it was not similar to the current offenses.

The State's evidence that Parham was involved in the burglary and theft was strong. There was other evidence suggesting that Parham was not credible, especially in denying having ever been at the victim's residence, despite the presence of his prints of the window used to gave entry. And only one of the two prior offenses was remotely similar to the burglary and theft charges. Parham fails to show that, within reasonable probabilities, the outcome of the trial would have been different had the jury not heard evidence of his prior convictions regardless of the trial court's limiting instructions. *Rivers*, 129 Wn.2d at 706. Therefore, we hold that the trial court did not abuse its discretion in instructing the jury.

II. Defendant's Failure to Testify Instruction

Parham next argues that the trial court erred when it refused to instruct the jury that it could not consider Parham's failure to testify to the burglary and theft charges as evidence of his guilt.[8] Again, we disagree.

A. Standard of Review

We review a trial court's refusal to give a requested instruction, when based on the facts of the case, for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). A trial court abuses its discretion when it exercises that discretion on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). "Jury instructions must not be misleading, must permit a party to argue his or her theory of the case and, when read as a whole, must properly inform the trier of fact on the law." *State v. Valentine*, 75 Wn. App. 611, 616, 879 P.2d 313 (1994), *aff'd*, 132 Wn.2d 1 (1997).

B. No Abuse of Discretion

The trial court refused to give the proposed defense instruction that the jury could not consider Parham's failure to testify as evidence of his guilt; the court reasoned that this instruction would confuse the jury because Parham had, in fact, testified and the proposed instruction was not limited to those charges about which he did not testify. We cannot say that the trial court was unreasonable in its reasoning and ruling here. Accordingly, we hold that the trial court did not

[8] Parham's appellate argument focuses entirely the trial's court refusal to give the instruction that defense counsel proposed. He does not argue that the trial court should have *sua sponte* altered the proposed instruction to limit it to the burglary and theft charges. Nor does he argue that his trial counsel was ineffective for failing to offer a different instruction.

abuse its discretion when it refused to give this proposed "failure to testify" instruction.[9]

III. Denial of Motion to Sever Charges

Finally, Parham argues that the trial court erred in denying his motions to sever trial of the bail jumping charges from trial of the burglary and theft charges. He contends that (1) the evidence of the bail jumping charges was stronger than the evidence supporting the burglary and theft charges, (2) his defense strategies were distinct, and (3) the impeachment evidence that was admissible as to the May 2 bail jumping charge was not cross-admissible as to the burglary and theft charges. Parham further asserts that the possible prejudice from the trial court's refusal to sever the charges was compounded when the trial court refused to instruct the jury that his failure to testify was not evidence of guilt. We disagree.

A. Standard of Review

We will reverse a trial court's denial of a motion to sever only if (1) the trial court manifestly abused its discretion, and (2) the defendant shows that a specific prejudice outweighs concerns for judicial economy. *State v. Bythrow,* 114 Wn.2d 713, 717-18, 720, 790 P.2d 154 (1990); *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211 (1983). Factors that indicate unfair prejudice are (1) a defendant's embarrassment in presenting separate defenses, (2) whether the jury might cumulate evidence to find guilt, and (3) whether the jury will infer a criminal disposition. *Bythrow,* 114 Wn.2d at 718. To decide whether any

[9] We note that all of the cases that Parham cites in support of his argument on this issue address situations where the defendant did not testify about any charge; accordingly, these cases are not instructive here. See Br. of Appellant at 15-16 (citing *Carter v. Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981); *Bruno v. United States*, 308 U.S. 287, 293-94, 60 S. Ct. 198, 84 L. Ed. 2d 451 (1939); *United States v. Garguilo*, 310 F.2d 249, 262 (2nd Cir. 1962); *State v. King*, 24 Wn. App. 495, 601 P.2d 982 (1979)).

potential prejudice requires severance, we consider (1) the strength of the evidence on each count, (2) the clarity of the defenses on each count, (3) the efficacy of an instruction to consider each count separately, and (4) the admissibility of the evidence in separate trials. *State v. Warren*, 55 Wn. App. 645, 655, 779 P.2d 1159 (1989) (citing *State v. Watkins*, 53 Wn. App. 264, 269, 766 P.2d 484 (1989)), *review denied,* 114 Wn.2d 1004 (1990); *see also Bythrow*, 114 Wn.2d at 720-23. These factors are not present here.

B. Strength of the Evidence

We disagree with Parham's assertion that the bail jumping evidence was stronger than the burglary and theft evidence. Although the evidence that Parham failed to appear on May 2 and July 25 was uncontroverted, there was also strong evidence that Parham participated in the burglary and theft in that Parham's otherwise-unexplained fingerprints were on the window where the burglary and theft had occurred. In conjunction with Parham's suspect claims to Lindt that he had never been to the residence and that he did not want Lindt to see certain items at his residence, these prints provided evidence of Parham's involvement in the burglary and theft that was at least as strong as the bail jumping evidence.

C. Clarity of Defenses on Each Count

Parham's defense to each count was also very clear. There was no question that (1) Parham was relying on his alleged inadequacy of the State's evidence, and/or the fact that he denied participating in the burglary and theft when Lindt interviewed him, to overcome the burglary and theft charges; but (2) he was asserting an "uncontrollable circumstances" defense to the May 2 bail jumping charge. These approaches were not mutually exclusive or otherwise

incompatible.

D. Instruction to Consider Each Count Separately

The trial court also instructed the jury to consider each count separately. Evidence of the burglary and theft was sufficiently distinct from the evidence related to the bail jumping charges that a jury could easily follow this instruction.[10]

E. Cross-Admissibility

Although the evidence of the bail jumping charges was not generally cross-admissible as to the burglary and theft charges, Washington courts have repeatedly held that bail jumping charges may be tried with the underlying offenses. *State v. Bryant*, 89 Wn. App. 857, 866-67, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999). The only potentially troublesome evidence was the impeachment evidence, which, as we discuss above, was properly limited to Parham's *testimony*, which, in turn, related only to his May 2 bail jumping charge. Again, although the trial court may not have expressly limited the impeachment evidence to the May 2 bail jumping charge, the instructions as a whole had the same effect and there was no reasonable probability that the jury used the impeachment evidence to find Parham guilty on the burglary and theft charges.

F. No Specific Prejudice

[10] The only potential issue was the effect of the impeachment evidence, which was admissible in relation to only the May 2 bail jumping charge. But, as we discuss above, the trial court instructed the jury that the impeachment evidence could be considered only "in deciding what weight or credibility should be given to the *testimony* of the defendant and for no other purpose." CP at 88 (Instruction 6). Because Parham's *testimony* related to only the May 2 bail jumping charge, the risk that the jury would consider the impeachment evidence when evaluating the burglary and theft charges was minimal; and it is unlikely that this evidence interfered in the jury's ability to follow the trial court's instruction that it consider each count separately.

In sum, the above factors do not suggest that any potential prejudice outweighed the need for judicial economy. Thus, we hold that the trial court did not abuse its discretion when it denied Parham's motions to sever the bail jumping charges from the burglary and theft charges.

Finding no reversible error, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Quinn-Brintnall, J.